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12 NESTLÉ WATERS NORTH AMERICA INC.

13 UNITED STATES DISTRICT COURT
14 SOUTHERN DISTRICT OF CALIFORNIA

15 JESSE GARCIA, JR., on behalf of
16 himself and all others similarly situated,

17 Plaintiff,

18 v.

19 CAINE & WIENER COMPANY, INC.
20 and NESTLÉ WATERS NORTH
21 AMERICA INC.,

22 Defendants.

Case No. 16-CV-00850-DMS (DHB)

CLASS ACTION

**ANSWER TO SECOND
AMENDED COMPLAINT**

Judge: Hon. Dana M. Sabraw
Dept.: 13A

Trial Date: Not Set

Second Amended
Complaint Filed: September 29, 2016
Action Filed: April 8, 2016

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1 Defendant Nestlé Waters North America Inc. (“NWN”), by and through its
2 undersigned counsel, hereby responds to the Second Amended Complaint
3 (“Complaint”) filed by plaintiff Jesse Garcia, Jr. (“Plaintiff”) as follows:

4 **Introduction**

5 1. NWN admits that this action is brought against NWN under the
6 Telephone Consumer Protection Act, 47 U.S.C. §227 (“TCPA”). Except as
7 specifically admitted, NWN denies the allegations contained in Paragraph 1 of the
8 Complaint.

9 **Jurisdiction and Venue**

10 2. The allegations set forth in Paragraph 2 are legal conclusions to which no
11 response is required. To the extent an answer is deemed necessary, NWN admits
12 that the court has federal question subject matter jurisdiction because the action
13 arises under the TCPA. NWN denies that the Court has diversity jurisdiction
14 under the Class Action Fairness Act (“CAFA”) and denies all remaining allegations
15 in Paragraph 2 of the Complaint.

16 3. The allegations set forth in Paragraph 3 are legal conclusions to which no
17 response is required. To the extent an answer is deemed necessary, NWN denies
18 the allegations contained in Paragraph 3 of the Complaint.

19 **Parties**

20 4. NWN is without knowledge or information sufficient to form a belief as
21 to the truth of the allegations in Paragraph 4 and, therefore, denies them.

22 5. NWN denies the allegation contained in Paragraph 5 that Defendant
23 Caine & Weiner Company, Inc. (C&W) made telephone calls on behalf of, and as
24 an agent of, NWN. NWN is without knowledge or information sufficient to
25 form a belief as to the truth of the remaining allegations in Paragraph 5 and,
26 therefore, denies them.

27 6. NWN admits that it is a corporation incorporated in the State of
28 Delaware, with its principal place of business located at 900 Long Ridge Road,

1 Stamford, Connecticut; that it conducted business in the State of California; and
2 that it owns multiple trademarks, including the Ozarka Brand trademark. Except as
3 specifically admitted, NWNA denies the remaining allegations contained in
4 Paragraph 6 of the Complaint.

5 **The Telephone Consumer Protection Act**
6 **(TCPA) 47 U.S.C. §227**

7 7. NWNA admits that Congress enacted the TCPA in 1991 and is otherwise
8 without knowledge or information sufficient to form a belief as to the truth of the
9 allegations concerning enactment of the TCPA and, therefore, denies them.

10 8. The allegations set forth in Paragraph 8 of the Complaint are legal
11 conclusions to which no response is required. To the extent an answer is deemed
12 necessary, NWNA denies those allegations.

13 9. The allegations set forth in Paragraph 9 of the Complaint are legal
14 conclusions to which no response is required. To the extent an answer is deemed
15 necessary, NWNA denies those allegations.

16 10. The allegations set forth in Paragraph 10 of the Complaint are legal
17 conclusions to which no response is required. To the extent an answer is deemed
18 necessary, NWNA denies those allegations.

19 11. The allegations set forth in Paragraph 11 of the Complaint are legal
20 conclusions to which no response is required. To the extent an answer is deemed
21 necessary, NWNA denies those allegations.

22 12. The allegations set forth in Paragraph 12 of the Complaint are legal
23 conclusions to which no response is required. To the extent an answer is deemed
24 necessary, NWNA denies those allegations.

25 13. The allegations set forth in Paragraph 13 of the Complaint are legal
26 conclusions to which no response is required. To the extent an answer is deemed
27 necessary, NWNA denies those allegations.

28 14. NWNA denies the allegations contained in Paragraph 14 of the

1 Complaint.

2 15. The allegations set forth in Paragraph 15 of the Complaint are legal
3 conclusions to which no response is required. To the extent an answer is deemed
4 necessary, NWNA denies those allegations.

5 16. The allegations set forth in Paragraph 16 of the Complaint are legal
6 conclusions to which no response is required. To the extent an answer is deemed
7 necessary, NWNA denies those allegations.

8 17. The allegations set forth in Paragraph 17 of the Complaint are legal
9 conclusions to which no response is required. To the extent an answer is deemed
10 necessary, NWNA denies those allegations.

11 **The Fair Debt Collections Practices Act (FDCPA)**

12 **15 U.S.C. §1692**

13 18. The allegations set forth in Paragraph 18 of the Complaint are legal
14 conclusions to which no response is required. To the extent an answer is deemed
15 necessary, NWNA denies those allegations.

16 19. The allegations set forth in Paragraph 19 of the Complaint are legal
17 conclusions to which no response is required. To the extent an answer is deemed
18 necessary, NWNA denies those allegations.

19 20. The allegations set forth in Paragraph 20 of the Complaint are legal
20 conclusions to which no response is required. To the extent an answer is deemed
21 necessary, NWNA denies those allegations.

22 21. The allegations set forth in Paragraph 21 of the Complaint are legal
23 conclusions to which no response is required. To the extent an answer is deemed
24 necessary, NWNA denies those allegations.

25 **Plaintiff's Factual Allegations**

26 22. NWNA is without knowledge or information sufficient to form a belief
27 as to the truth of the allegations of Paragraph 22 as to Plaintiff's citizenship and,
28 therefore, denies them. The remaining allegations set forth in Paragraph 22 are

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1 legal conclusions to which no response is required. To the extent an answer is
2 deemed necessary, NWNA denies the allegations.

3 23. The allegations set forth in Paragraph 23 of the Complaint are legal
4 conclusions to which no response is required. To the extent an answer is deemed
5 necessary, NWNA denies those allegations.

6 24. NWNA admits that it conducted business in the State of California and
7 County of San Diego. Except as specifically admitted, NWNA is without
8 knowledge or information sufficient to form a belief as to the truth of the
9 allegations alleged as to defendant C&W and, therefore, denies them.

10 25. NWNA is without knowledge or information sufficient to form a belief
11 as to the truth of the allegations in Paragraph 25 and, therefore, denies them.

12 26. NWNA denies the allegations contained in Paragraph 26 of the
13 Complaint.

14 27. NWNA denies the allegations contained in Paragraph 27 of the
15 Complaint.

16 **The Illegal Calls And Messages**

17 28. NWNA denies the allegations contained in Paragraph 28 of the
18 Complaint.

19 29. NWNA denies the allegations contained in Paragraph 29 of the
20 Complaint.

21 30. NWNA denies the allegations contained in Paragraph 30 of the
22 Complaint.

23 31. NWNA admits the allegations contained in Paragraph 31 of the
24 Complaint.

25 32. NWNA denies the allegations contained in Paragraph 32 of the
26 Complaint.

27 33. NWNA denies the allegation contained in Paragraph 33 that Defendant
28 C&W made a telephone call on behalf of NWNA. NWNA is without knowledge or

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1 information to form a belief as to the truth of the remaining allegations in Paragraph
2 33 and, therefore, denies them.

3 34. NWNA is without knowledge or information to form a belief as to the
4 truth of the allegations in Paragraph 34 and, therefore, denies them.

5 35. NWNA denies the allegations contained in Paragraph 35 of the
6 Complaint.

7 36. NWNA denies the allegations contained in Paragraph 36 of the
8 Complaint.

9 37. NWNA denies the allegations contained in Paragraph 37 of the
10 Complaint.

11 38. NWNA denies the allegations contained in Paragraph 38 of the
12 Complaint.

13 39. NWNA denies the allegations contained in Paragraph 39 of the
14 Complaint.

15 40. NWNA is without knowledge or information to form a belief as to the
16 truth of the allegations in Paragraph 40 and, therefore, denies them.

17 41. NWNA denies the allegations contained in Paragraph 41 of the
18 Complaint.

19 42. NWNA denies the allegations contained in Paragraph 42 of the
20 Complaint.

21 43. The allegations set forth in Paragraph 43 are legal conclusions to which
22 no response is required. To the extent an answer is deemed necessary, NWNA
23 denies those allegations.

24 44. The allegations set forth in Paragraph 44 are legal conclusions to which
25 no response is required. To the extent an answer is deemed necessary, NWNA
26 denies those allegations.

27 45. NWNA denies the allegations contained in Paragraph 45 of the
28 Complaint.

1 46. NWNA denies the allegations contained in Paragraph 46 of the
2 Complaint.

3 47. The allegations set forth in Paragraph 47 are legal conclusions to which
4 no response is required. To the extent an answer is deemed necessary, NWNA
5 denies those allegations.

6 **Class Action Allegations**

7 48. NWNA admits that Plaintiff brings this action on behalf of himself and
8 denies all remaining allegations contained in Paragraph 48.

9 49. NWNA denies the allegations contained in Paragraph 49 of the
10 Complaint.

11 50. NWNA is without knowledge or information to form a belief as to the
12 truth of the allegations in Paragraph 50 and, therefore, denies them.

13 51. NWNA denies that there is a class, as defined by Plaintiff, and,
14 therefore, no response is required as to Plaintiff's allegations as to the persons and
15 entities which are excluded from this non-existent class.

16 52. NWNA denies the allegations contained in Paragraph 52 of the
17 Complaint.

18 53. NWNA denies the allegations contained in Paragraph 53 of the
19 Complaint.

20 54. The allegations set forth in Paragraph 54 are legal conclusions to which
21 no response is required. To the extent an answer is deemed necessary, NWNA
22 denies the allegations contained in Paragraph 54 of the Complaint.

23 55. NWNA denies the allegations contained in Paragraph 55 of the
24 Complaint.

25 56. NWNA denies the allegations contained in Paragraph 56 of the
26 Complaint.

27 57. NWNA denies the allegations contained in Paragraph 57 of the
28 Complaint.

1 Complaint.

2 68. NWNA denies the allegations contained in Paragraph 68 of the
3 Complaint.

4 69. NWNA denies the allegations contained in Paragraph 69 of the
5 Complaint.

6 **Third Cause Of Action**
7 **Violations Of The Fair Debt Collection Practices Act**
8 **15 U.S.C. §1692 et seq.**

9 **(AGAINST DEFENDANT CAINE & WEINER)**

10 70. NWNA repeats and reasserts its responses to the allegations of
11 Paragraphs 1 through 69 of the Complaint as if the same were set forth at length
12 herein.

13 71-75. The Third Cause of Action for violation of the Fair Debt Collection
14 Practices Act is alleged solely and exclusively as against defendant C&W. As there
15 are no allegations alleged against NWNA, NWNA need not respond to the
16 allegations in Paragraphs 71-75 of the Complaint.

17 **Prayer for Relief**

18 To the extent a response is required to Plaintiff's Prayer for Relief, NWNA
19 denies that Plaintiff is entitled to the relief he seeks.

20 **Separate Defenses**

21 NWNA sets forth below its separate defenses. Each separate defenses is
22 asserted as to all claims against NWNA. By setting forth these defenses, NWNA
23 does not assume the burden of proving any fact, issue or element of a cause of
24 action, where such burden properly belongs to Plaintiff. Nothing stated herein is
25 intended or shall be construed as an acknowledgment that any particular issue or
26 subject matter is relevant to Plaintiff's allegations. NWNA reserves the right to
27 assert additional separate defenses at such time and to such extent as warranted by
28 discovery and the factual developments in this case.

As separate and distinct defenses, NWNA alleges as follows:

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First Separate Defense

Plaintiff fails to state a claim upon which relief can be granted.

Second Separate Defense

This Court lacks subject matter jurisdiction, as Plaintiff does not have a standing to bring this lawsuit in this Court.

Third Separate Defense

NWNA cannot be liable under the TCPA, where Plaintiff consented to receive autodialed calls on his cell phone by providing his cell phone number to NWNA or an agent of NWNA, or in any other manner. This defense is asserted in the alternative to the argument that lack of consent is an element of a TCPA claim. Nor can NWNA be liable for calls made to Plaintiff with whom NWNA had an established business relationship.

Fourth Separate Defense

The alleged claims are barred with respect to Plaintiff to the extent he incurred no additional charge for the calls allegedly received in violation of the TCPA.

Fifth Separate Defense

The alleged claims are barred to the extent that they seek to hold NWNA liable for calls it did not make.

Sixth Separate Defense

Finding NWNA liable for calling a recipient who wished to receive the calls or did not object to receiving the calls would violate the First Amendment of the United States Constitution and similar provisions of various state constitutions.

Seventh Separate Defense

The TCPA is unconstitutionally vague and overbroad with respect to the definition of “automatic telephone dialing system.”

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Eighth Separate Defense

NWNA cannot be liable for any purported violations of 47 U.S.C. §227(c)(5) because it established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations purportedly in violation of the regulations prescribed under that subsection.

Ninth Separate Defense

NWNA did not engage in any knowing or willful conduct towards Plaintiff in violation of the TCPA.

Dated: February 16, 2017

Respectfully submitted,

DENTONS US LLP

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NORTH AMERICA INC.

CERTIFICATE OF SERVICE

I, Christopher J. Healey, certify that I caused to be served upon the following counsel and parties of record a copy of the following document(s):

ANSWER TO SECOND AMENDED COMPLAINT

as indicated/listed on the United States District Court, Southern District of California's CM/ECF registered email list in the above-referenced matter.

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Attorneys for Plaintiffs

*Attorneys for Defendant
CAINE & WEINER COMPANY, INC.*

I declare under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct. Executed at San Diego, California.

Dated: February 16, 2017

s/Christopher J. Healey
Christopher J. Healey

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